

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “G” MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)**

**ITA No. 2228/MUM/2022
Assessment Year: 2019-2020**

Gannon Dunkerley & Co. Ltd,
3rd floor, New Excelsior
Building AK Nayak Marg, Fort,
Mumbai-400 001.

PAN No. AAACG 1846 P

Appellant

Dy. CIT, Circle-1(1)(1),
Aayakar Bhavan,
Mumbai-400020.

Vs.

Respondent

Assessee by	:	Mr. Babulal Sharma, AR
Revenue by	:	Mr. Sanjay Vishwas Rao Deshmukh, DR

Date of Hearing	:	02/11/2022
Date of pronouncement	:	22/12/2022

ORDER

PER OM PRAKASH KANT, AM

This appeal has been preferred by the assessee against the order dated 29.06.2022 passed by the Ld. Commissioner of Income Tax (Appeals) – National Faceless Appeal Centre (NFAC), Delhi [in short, ‘the Ld. CIT(A)’] for A.Y. 2019-2020, raising a sole issue of delay deposit of employees contribution of PF/ESI. The relevant ground raised by the assessee is reproduced as under:



“1. The Ld. CIT(A) has grossly erred both on facts and in law in upholding impugned addition of Rs. 7,30,91,698/- u/s 36(1)(va) of the IT Act for delayed deposit of employee shares of PF/ESI ignoring the fact that such payments are paid before due date of filing of return of income us 139(1) of the IT Act and therefore are allowable under law as per decision of jurisdictional Bombay High Court and Honble Delhi High Court.”

2. The Ld. CIT(A) after considering the submission of the assessee has upheld the disallowance observing as under:

“7.5 With respect payment of PF dues, the facts of the case are carefully considered. It is pertinent to note that the EPF & MP Act 1952, which governs provident funds in certain sectors of the economy, speaks of two types of contributions, namely

-the Employee's share and

- The Employee's share

Both the above shares are unequal since the employer's share is capped at 12% of the eligible salary but the employee may opt to pay a higher contribution also. Similarly, there are Employer and Employee shares under the ESI Act, 1948 also.

The Employer deducts the Employees' share towards PF/ESI at the time of payment of their wages/salaries. Thus, the employer acts in a fiduciary capacity when it retains the deduction made from the employees' wages/salaries and till the employer makes over the



same to the concerned Fund. As a precautionary measure under the Income Tax Act, 1961, Section 2(24)(x) makes the employees' share as a deemed income in the hands of the employer. Section 2(24)(x) of the Act includes within the definition of income 'any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund.....etc.

However, the employer gets a deduction from its taxable income when it makes over the employees' shares to the respective Funds. The employer is mandated by law to ensure that the employees' share gets deposited within the 'due date provided under the respective PF/ESI Act. This is so because the under the PF/ESI Acts the employees' interests are protected and they get their interest on their deposits and pension/life cover under PF/ESI irrespective of the date of deposit of their share by the Employer. Even if the employees share is not deposited by the employer after it is received by the employer from their salary/wages, the EPFO/ESI is mandated to pay social security benefits to the employees. Hence, the EPFO/ESI gets burdened by social security liability and in order to curb any tendency on the part of the employers to delay the deposit of the employees contributions retained by them, such contributions are taxed if these are deposited after the 'due date' of payment. The employers are not permitted to claim any deduction on payment made subsequent to the due date.



Thus, under the Income Tax Act, 1961 the employees' contribution is deemed to be the income of the employer and a deduction is allowed u/s 36(1)(va) only when the said sum is deposited in the respective Fund before the due date prescribed under PF/ESI Acts.

7.6 The treatment of the employer's own contribution towards the PF/ESI of its employees is different. Here the outgo is only from the profits/income of the employer and no fiduciary element is involved. Therefore, the employer gets the benefit of deduction u/s 37 and u/s 43B if the payment is made before the date of filing of return of income. The deeming section 2(24)(x) in terms has no application and does not extend to the contribution of the employer. It is also necessary to note that Section 43B has application only in respect of the Employer's share.

7.7 The claim of the appellant that payment of employees' contributions which were not paid within the 'due date' specified under the SI and PF Acts should be allowed as a deduction u/s 43B is not as per the Statute. Under the provisions of section 2(24)(x) of the Act, the contributions from 'employees' are deemed income and subject to tax in the hands of the employer. Further the belated payment of the PF/ESI sums in the employee's account in the relevant fund per se will not entitle the employer to a deduction under section 36(1)(va) of the Act unless the employer had credited such contribution to the employee's account in the relevant fund within the 'due date' applicable for that



relevant fund. (incidentally Section 36(1)(va) was inserted by the Finance Act, 1987 w.e.f 1.4.1988].

Section 43B deals with what is deductible otherwise for the computation of income under the head 'Business or Profession'. The non-obstante clause with which the section begins is confined to 'in respect of matters dealt with in clauses 'a to g and does not extend beyond them. In effect, the sweeping nature of the section is restricted by the subject matter covered therein. The subject matter covered in section 43B(b) is only the employer's contribution.*

Here it is also necessary to refer to the Finance Minister's Budget speech while introducing the Finance Bill, 1987 wherein the object of the introduction of the sections 36(1)(va), 56(2)(ic) and 57 (ia) was explained as under:

Let me now come to the measures for the welfare of workers, members of armed forces and the handicapped. There are number of cases where the employers do not credit their own contribution or those of the employees to the credit of provident fund and State Insurance Fund. it is also unfortunate that a separate fund is not being kept by employers in respect of gratuity of workers. To prevent this anti labour practices, we propose to penalize such delinquent employers by providing that the contribution of employees to these funds will be taxed as income of the employer and allowed as a deduction only when they are made over to the separate accounts



relating to these funds within the time allowed under the statute."

The 'due date' is explained in the Explanation below Section 36(1)(va) to mean "the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund..... or otherwise".

7.8 In the Tax Audit Report, Form 3CD Clause 16(b) specifically requires the tax auditor to report the sums falling under the preview of section 2(24)(x), the due dates for payment of such sums and the actual dates of payment to the concerned authorities under section 36(1)(a). The significance attached to the due dates and the actual dates of payment in respect of employee's contributions in the Tax Audit Report is different from the employer's contribution dealt with under clause 21. Clause 21 distinguishes the employer's contribution on the basis of its occurrence in a given previous year or prior to it and its payment in the previous year. Thus, the Tax Audit Report also maintains a conscious differential approach between the two types of payments, employer and employee's contributions.

7.9 Therefore, it seems clear that the argument that the delayed deposit of employees contribution towards PF/ESI can be permitted as a deduction from the income of the assessee is of no avail and section 43B is not involved. The matter has also been considered by various High Courts. The Hon'ble Gujarat High Court in the case of CIT v/s Gujarat State Road Transport



Corporation (2014) 41 taxmann.com 100, has held as under:

If employees contribution received by the assessee is not credited to the employees' account in the relevant fund or funds on or before the due date mentioned in the Explanation to section 36(1)(va) i.e. due dates under PF Act, ESI Act/other law], the assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28 of the Act even if contributions deposited on or before due date under section 43B [i.e. due date for filing income tax return under section 36(1)(va)] for depositing employers' contributions to those funds".

In arriving at this decision, Hon'ble High Court of Gujarat has considered the decision of the Hon'ble Supreme Court in CIT vs. Alom Extrusions Limited 319 IT 306 and held that the same is not applicable to the "employees' contribution" to the PF Act. This judgment was again followed by Hon'ble' Gujarat High Court in the case of PCIT vs. Suzion Energy Ltd. 115 taxmann.com 340.

The Hon'ble Delhi High Court in the case of CIT vs. Bharat Hotels Ltd. 410 ITR 417 Order dated 06/09/2018 has also decided this issue in favour of Revenue and not followed the judgement of Aimil Ltd. 321 IT 508 of Delhi High Court of 2014. Hon'ble ITAT Delhi in the case of Eagle Trans Shipping & Logistics (India) (P.) Ltd. 109 taxmann.com 426 vide order dated 25/07 2019 has also decided this issue in favour of



Revenue. The case of Hon'ble Supreme Court in the case of Vinay Cement and Alom Extrusions Ltd are related to Employer's contribution of provident fund and not to the Employee's contribution.

7.10 The issue is also covered against the assessee by CBDT Circular No. 22/2015 issued by the Department. A similar view has been taken by the Kerala High Court in the case of CIT vs. Merchem Ltd (2015) 378 ITR 443.

7.11 But at the same time, on the identical issue the following decisions are in favour of assessee. i. AIMIL Ltd. (2010) 321 ITR 508 (Del.), ii. State Bank of Bikaner & Jaipur [(2014) 363 ITR 70 (Rajasthan)]. ii. Essae Teraoka (P) Ltd. (2014) 366 ITR 408 and iv. Spectrum Consultants India P. Ltd [(2014) 2 ITR-OL 622., v. South India Corporation Ltd. and vi. GhatgePatil Transports Ltd. 368 IT 749, CIT Versus Sabari Enterprises 298 IT 141 (Karn) CIT, Jaipur-II Versus Jaipur Vidyut Vitran Nigam Ltd and Rajasthan Rajya Vidyut Utpadan Nigam Ltd (2014) 363 IT 307, CIT Versus. State Bank Of Bikaner & Jaipur And Jaipur Vidyut Vitaran Nigam Ltd. [2014] 363 IT 70. It is held that "contribution" used in Section 43-B(b) of the IT Act means the contribution of the employer and the employee. That being so, contribution made on or before the due date under section 139(1) the employer is entitled for deduction.

As on date there is no Supreme Court judgment on this issue i.e., delayed payment of employees' contribution of PF dues.



7.12 But, the Finance Act, 2021 has inserted Explanation 5 to section 43B so as to clarify that the provisions of the section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies. The relevant portion of the act is:

In order to provide certainty, it is proposed to amend clause (a) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the due date under this clause and amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

Hence, I hold that if the employer fails to deposit the entire amount towards employees' contribution on account of PF & SI with concerned department on or before the due date under PF & ESI act, the assessee shall not be entitled for deduction to that extent. In fine if employees contribution received by the assessee is not credited to the employees' account in the relevant fund or funds on or before the due date mentioned in the Explanation to section 36(1)(va) [i.e. due dates under



PF Act, ESI Act/other law], the assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28 of the Act even if contributions deposited on or before due date [i.e. due date for filing income tax return under section 36(1)(va)] for depositing employers' contributions to those funds. In result, the appeal is dismissed.”

3. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. In view of decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. V. CIT in Civil Appeal No. 2833 of 2016 wherein it is held that delay of employees contribution to PF/ESI is not allowed as deduction u/s 36(1)(va) of the Income Tax Act, 1961 (in short 'the Act'). The relevant finding of the Hon'ble Supreme Court is reproduced as under:

“52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the



amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Commissioner of Income-Tax Vs. Aimil Ltd., [2010] 321 ITR 508 (Delhi High Court).

Commissioner of Income-Tax and another Vs. Sabari Enterprises, [2008] 298 ITR 141 (Karnataka High Court).

Commissioner of Income Tax Vs. Pamwi Tissues Ltd., [2009] 313 ITR 137 (Bombay High Court).

Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd., [2013] 35 taxmann.com 616 (Rajasthan High Court).

Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were



receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees’ share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers’ contribution (Section 36(1)(iv)) and employees’ contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessee’s liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessee is following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

53. The distinction between an employer’s contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers’ income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount



received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer’s liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees’ income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer’s obligation to deposit the amounts retained by it or deducted by it from the employee’s income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees’ contributions- which are deducted from their income. They are not part of the assessee employer’s income, nor are they heads of deduction per se in the form of statutory pay out. They



are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.”

3.1 Respectfully following the same, we do not find any infirmity in the order of the Ld. CIT(A) on the issue-in-dispute and accordingly we uphold the same.

4. The appeal of the assessee is accordingly dismissed.



**Order pronounced under Rule 34(4) of the ITAT Rules,
1963 on 22/12/2022.**

**Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 22/12/2022
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai